Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DARREN ROY MACK,

Petitioner

v.

STATE OF NEVADA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is a denial of due process of law and the effective assistance of counsel for both defense counsel and the trial court to fail to give a defendant, contemplating a guilty or *Alford* plea to greater offenses under a plea agreement, any advice on (1) the existence of lesser-included offenses ("LIOs") to the greater offenses to which the defendant is considering entering guilty or *Alford* pleas under a plea agreement, (2) the elements of and penalties for such LIOs, and (3) the likelihood of conviction only upon such LIOs at trial.

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Counsel for Darren Roy Mack, petitioner, respectfully petitions for a writ of certiorari to review the judgment of the Nevada Supreme Court in this case.

OPINION BELOW

The order of affirmance of the Nevada Supreme Court (App., *infra*, 1a-11a) is not reported in the official Nevada reports. The orders of the Nevada district court are also not reported. App., *infra*, 12a-16a.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on June 22, 2010. A timely petition for rehearing was denied on September 3, 2010. App., *infra*, 17a-18a. This Court has jurisdiction to hear this petition under 28 U.S.C. Section 1257 as the decision of the Nevada Supreme Court is a final judgment of the highest court in that state and involves issues pertaining to the Sixth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI. The Sixth Amendment is applicable to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965).

The Fourteenth Amendment provides in relevant part:

> Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. Amend. XIV.

STATEMENT

This case involves an important question of constitutional law regarding the taking of pleas from criminal defendants to greater offenses when there are lesser-included offenses ("LIOs") to those greater offenses. The factual record in this case indisputably showed that neither defense counsel nor the trial court advised the petitioner herein, defendant Darren Roy Mack ("Mack"), of the existence of LIOs to the greater offenses to which he entered a guilty plea and an *Alford* plea, the elements of and penalties for such LIOs, or the likelihood of conviction only upon the LIOs at trial. Mack contended that these failures denied him his federal rights to due process of law and to the effective assistance of counsel.

The Nevada Supreme Court answered that question in the negative – finding no such right to advisement on LIOs and that such advisement on LIOs was not necessary to make a guilty or *Alford* plea to greater offenses a knowing, voluntary, and intelligent plea. This holding is, as discussed *infra*, contrary to the basic principles set out by this Court on what is necessary to make a plea a knowing, voluntary and intelligent one.

It is also contrary to case law authority from federal and state courts holding that the failure of defense counsel and/or the trial court to advise a defendant of such LIOs when taking a plea to a greater offense denies a defendant his federal right to due process of law because such a plea is not a knowing, voluntary, and intelligent one, thereby denying a defendant his federal right to the effective assistance of counsel.

A. Trial Court Proceedings

Mack went to a jury trial in Nevada district court on charges that, on June 12, 2006, he committed first degree murder of Charla Mack (his estranged wife, with whom he was in a bitterly- contested divorce proceeding) ("Ms. Mack") (Count One), attempted murder of Judge Weller (the judge handling the divorce matter) ("Weller") (Count Two), and with battery with use of a deadly weapon resulting in substantial bodily harm to Weller (Count Three). The prosecution case-in-chief took six days to present witness testimony with a seventh day planned for introduction of all prosecution exhibits. On the evening of the Friday when the prosecution completed presenting witness testimony, Mack's trial counsel, Mssrs. Chesnoff ("Chesnoff") and Freeman ("Freeman"), continued a dialogue they were having with the prosecution throughout the trial about a plea deal for Mack, and Chesnoff called the prosecutor to further pursue a possible plea deal. From that Friday evening through that weekend, Chesnoff and Freeman repeatedly met with Mack and strongly recommended that he take the plea deal that they had worked out with the prosecution. That plea deal would require entry of a guilty plea to first degree murder of Ms. Mack (with

deletion of the use of a deadly weapon allegation and with an agreed court sentence of life with parole eligibility after 20 years imprisonment), an *Alford* plea to the attempted murder of Weller (with no sentencing agreements), and dismissal of the battery charge.

On the following Monday, Mack accepted the plea deal and entered his pleas, which the district court accepted. Within a few days thereafter, Mack decided he wanted to withdraw his pleas and have his full trial. Mack substituted in new defense counsel, Mr. Routsis, in place of trial counsel. Routsis filed Mack's motion to withdraw his pleas[1] (hereinafter "the motion"). The motion was fully briefed and the court held an evidentiary hearing on the motion, made various findings, and denied the motion. In so doing, the court found that there was no right to advice on LIOs to the offenses to which Mack entered his pleas.

Mack was sentenced on February 8, 2008, on Count One to life imprisonment (with parole eligibility after a minimum of twenty years imprisonment), and, on Count Two, a maximum sentence of twenty years imprisonment (with parole eligibility after a minimum of eight years

1. In Nevada, a pre-sentence motion to withdraw a plea is judged by a relaxed standard, allowing broad discretion to grant withdrawal for any substantial reason that is fair and just. *Molina v. State*, 120 Nev. 185, 191, 87 P3d 537 (2004). A denial of a motion to withdraw is reviewed for abuse of discretion. *Id.* The motion must be decided by looking to the totality of the circumstances in each case, with a review of the entire record to determine if the pleas were valid. *Id.* A court cannot simply review the plea canvass in a vacuum. *Mitchell v. State*, 109 Nev. 137, 140-41, 848 P.2d 1060, 1061-62 (1993).

imprisonment) with a consecutive maximum sentence of twenty years imprisonment (with parole eligibility after a minimum of eight years imprisonment) for use of a deadly weapon against Weller. The sentence on Count Two was ordered to run consecutively to Count One – for a total minimum sentence to parole eligibility of twenty-eight years and a maximum of life imprisonment. Mack thereafter sought reconsideration of the denial of his motion, which was denied. Mack filed a timely notice of appeal to the Nevada Supreme Court.[2] As discussed *infra*, that court held that no such advisement of LIOs to the greater offenses to which Mack entered his pleas was required, by either defense counsel or the district court.

1. Evidence Requiring The Giving Of LIOs

a. Nevada Law on LIOs

In Nevada there are several LIOs to first degree murder - (1) second degree murder [*Cunningham v. State*, 113 Nev. 897, 908, 944 P.2d 261, 268 (1997)]; (2) voluntary manslaughter [*Blake v. State*, 121 Nev. 779, 791, 121 P.2d 567, 575 (2005); *Crawford v. State*, 121 Nev. 744, 750-57, 121 P.2d 582, 586-91 (2005)]; and (3) involuntary manslaughter [*Wegner v. State*, 116 Nev. 1149, 1156-57, 14 P.3d 25, 30 (2000), *overruled on other grounds, Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2007); *Thedford v. Sherriff*, 86 Nev. 741, 745, 476 P.2d 25, 28 (1970)]. Mack was charged with what the

2. In the Nevada court system there is no intermediate appellate court between the district court and the Nevada Supreme Court.

prosecution conceded was "open murder."[3] Thus, the open murder charge itself required, as a matter of law, the giving of LIO instructions on second degree murder and voluntary and involuntary manslaughter.

In Nevada there also is at least one LIO to attempted murder – battery with use of a deadly weapon. *Benitez v. State*, 111 Nev. 1363, 1364-65, 904 P.2d 1036, 1037-38 (1995).

The Nevada law on the giving of LIO instructions is very liberal, requiring the giving of such LIO instructions so long as there is some evidence, however weak or incredible, to support it.[4]

3. Under Nevada law, an open murder charges necessarily includes the LIOs of second degree murder, voluntary manslaughter, and involuntary manslaughter and requires instruction on them as a matter of law. *Wrenn v. Sheriff*, 87 Nev. 85, 482 P.2d 289 (1971); *Thedford v. Sheriff*, 86 Nev. at 745 (*citing Miner v. Lamb*, 86 Nev. 54, 464 P.2d 451 (1970)); *Parsons v. State*, 74 Nev. 302, 329 P.2d 1070 (1958)); *State v. Oschoa*, 49 Nev. 194, 242 P. 582 (1926)).

4. A Nevada defendant is entitled to jury instructions on LIOs if the evidence would permit a jury rationally to find him guilty of a LIO and acquit him of the greater; refusal to give such LIO instructions is error even if there is strong evidence as to the greater charge. *Rosas*, 147 P.3d at 1105-06. A defendant is entitled to such instructions to avoid the substantial risk that a jury will convict despite a failure to prove the charged offense if the defendant appears guilty of some offense. *Id.* at 1106. A defendant has a general right to a LIO instruction on his theory of the case, so long as there is *some evidence, no matter how weak or incredible, to support it. Id.* The only conditions are that (1) the LIO is necessarily included in the charged offense (where all the elements of the LIO are included in the elements

(Con'd)

b. The Evidence Supporting The Giving Of LIO Instructions

The evidence presented by Mack during the trial and on his motion showed that he would have been entitled to the giving of such LIOs instructions at the end of his jury trial on the open murder and attempted murder charges. This was an open murder charge with an additional shooting and wounding of Weller, charged as attempted murder, all occurring on the same day.

(1) Mack Opening Statement

In Mack's opening statement Freeman outlined a defense theory that the core of the first degree murder charge defense was self-defense, or at least something less than first degree murder, predicated upon the violent nature and character of the decedent, Ms. Mack, and her initial violent and potentially deadly attack on Mack in the garage of his condo and his defense of himself against that deadly attack. Freeman outlined that the trial evidence would show that Ms. Mack first struck Mack from behind, they struggled, she twice tried to shoot him at short range with a gun, and, in self-defense against her deadly attack, Mack stabbed

(Cont'd)
of the greater offense) and (2) there is "some" evidence warranting instruction on the LIOs. *Id.* at 1105 06. A defendant is entitled to instructions on any LIO if there is any evidence at all, *however slight*, on any reasonable theory of the case under which the defendant might be convicted of that offense. *Id.* at 1106; *Ruland v. State*, 102 Nev. 529, 531, 728 P.2d 818, 819 (1986) (defendant entitled to theory of defense instruction if some evidence, no matter how weak or incredible, supports it).

her in the neck, causing her death. Chesnoff's opening statement outlined an insanity defense against the charges of attempted murder of or assault on Weller – that Mack was insane when he shot Weller and did not intend to kill him.

Freeman's opening statement outlined the evidence of the violent tendencies and outbursts of Ms. Mack against Mack and her physical and verbal abuse of him, and how Mack was fearful of violent attack by her during the divorce proceedings. He outlined how, and the trial evidence showed that, on June 12, 2006, Ms. Mack came, with their daughter, Erika, to Mack's condo and how Mack had, on June 11, 2006, asked his friend, Dan Osborn, temporarily living with Mack, to take Erika to Mack's mother's house the morning of June 12th since Mack was going to meet that day with an appellate lawyer about his divorce. Freeman outlined (and the trial and hearing evidence supported) that when Ms. Mack arrived on June 12th, Erika and Osborn went upstairs while Ms. Mack and Mack talked in the garage about their divorce and that she demanded he drop his plan to appeal divorce financial rulings. Freeman outlined how Mack told her he intended to appeal and would succeed, and Ms. Mack then threatened to move to Los Angeles so he could not see Erika. He outlined how Mack stated to her that such a threat made her just like his first wife and he would see how his appeal went, which enraged Ms. Mack. Freeman outlined how Mack then turned away from her and she came up behind him and attacked him, knocking him to the ground while she called him names. Freeman outlined an ensuing physical struggle between Mack and Ms. Mack, where Mack's permitted concealed weapon came out of his pocket and

was picked up by Ms. Mack, who then tried to shoot Mack, with the gun misfiring and with Mack thinking he had been shot. Freeman outlined how as the physical struggle continued on the garage floor between them, Mack got hold of the knife he carried for protection while Ms. Mack was again trying to shoot him with the cocked gun, and how Mack, believing she would kill him, continued to struggle with her to defend himself and finally stabbed her once in the neck, killing her. Freeman outlined that after Ms. Mack's attack and her death, Mack showered and changed, put his and Ms. Mack's vehicles in his garage, and left his condo in his rental Explorer SUV, having decided to leave Reno and think about what to do. Freeman outlined how Mack called Osborn, who had left the condo with Ericka, set up a meeting, and met with Erika to say goodbye. Freeman outlined how Mack then left to drive to the airport, but got off the freeway and drove to the parking garage across from Weller's chambers, where he took one rifle shot at Weller through the chambers window, intending only to wound and not kill Weller.

Chesnoff's opening statement focused on the attempted murder charge and described how Mack suffered from a delusional disorder, in part caused by Weller's treatment of him in the divorce proceeding, that made him insane at the time of the shooting, and that Dr. Roitman would testify that, at the time of the shooting, Mack was suffering from a delusional disorder and was in a delusional state. Chesnoff outlined how Mack, while in that delusional state from a mental disorder, then went and shot Weller, explaining that Mack could outwardly appear normal while in this state. Chesnoff also outlined that, because of how Mack viewed

Weller as abusive of him in the divorce proceeding, part of Mack's grandiose delusion was that he felt he had great insight others did not have, and felt he was a revolutionary who had the right to attack Weller for Weller's abuse of office, where some of Weller's rulings and conduct fueled Mack's delusional state. Chesnoff also described how Mack acted on auto pilot, believing he was divinely inspired by God and the Second Amendment to combat Weller's tyranny by acting out and shooting him in order to, in Mack's mind, redress Weller's abuse and corruption of his judicial office. Chesnoff explained how Dr. Roitman, a psychiatrist, would explain these triggers, and how when Mack saw Weller in his chambers while in the parking garage, that also was a trigger that Mack was intended to be the one to redress these delusional grievances by shooting (but not killing) Weller, so that Weller did not become martyr, with everyone concerned only about Weller's death and not his abuse of his judicial office.

(2) Evidence On Hearing Of Motion And At Sentencing

During the evidentiary hearing on Mack's motion to withdraw his plea, Chesnoff further explained the not guilty by reason of insanity defense (the "NGI defense") to the Weller count, stating that, according to the medical experts Chesnoff would have called as expert witnesses, Mack had a recognized delusional disorder and that part of that delusional disorder was that Mack believed he had a Second Amendment right to shoot Weller. Chesnoff explained that the killing of Ms. Mack was a triggering event that caused the delusional Mack conduct of shooting Weller. He explained how Dr. Siegel,

a defense expert and one of the foremost pharmacological experts in the country, was going to testify at trial that Mack's excessive drug use helped precipitate the delusional conduct that led Mack to believe he had a constitutional right to shoot Weller. Chesnoff explained that his presentation of the Mack NGI defense was intended to fit with the self-defense theory on the killing of Ms. Mack. Chesnoff explained that the NGI defense was that Mack suffered from a delusional disorder at the time he shot Weller and that Mack was temporarily insane from the time he left his home after the killing of Ms. Mack through the time of his shooting Weller. Chesnoff explained that Dr. Siegel, a highly respected expert pharmacologist, had concluded that Mack was one of the most paranoid persons he had ever evaluated. Chesnoff explained that he had a clear scientific basis for the NGI defense based upon the opinions of Dr. Roitman and Dr. Siegel that Mack suffered from a delusional disorder at the time he shot Weller.

In addition, Chesnoff testified that he had explained to the court during the trial that Dr. Roitman would testify that Mack was, at the time of the shooting of Weller, suffering from a mental disorder and that Mack was not guilty by reason of insanity in regard to the attempted murder of Weller. Chesnoff further explained that the defense case would show that, at the time of the Weller shooting, Mack was disconnected from reality, was engaging in depersonalization, was suffering from delusions, and was on a mission from God.

At the hearing on the motion to withdraw, Mack testified that Ms. Mack tried to shoot him with the gun

and that he defended himself against her attack on him, stabbing her in the neck and otherwise trying to defend himself against her deadly attack. Mack also testified about how she had been physically and verbally abusive to him during the divorce, how she had wanted to kill his ex-wife, and how he did not premeditate killing her or intend to kill Weller.

Mack testified at his sentencing that he (1) feared Ms. Mack's violent propensities, (2) had told Judge Weller of his fears, (3) that Ms. Mack had solicited the murder of Mack's ex-wife, (4) had not planned to kill Ms. Mack, and (5) stabbed her in self-defense after his wife had attacked him that day and tried to shoot him.

(3) Evidence Presented At The Trial Before The Pleas Were Entered

Evidence presented at trial directly and circumstantially supported the defense theories. The pathologist testified at trial that the wounds found on Ms. Mack's neck, arms and legs could have been either defensive or offensive wound and could not opine from the wounds that Mack was the aggressor in the fatal fight. Evidence was presented about Ms. Mack's prior physical and verbal abusive attacks against Mack and about how Mack feared Ms. Mack because of her physically violent and verbally abusive nature. There was testimony that Mack had told others, including Judge Weller, that Mack had told them a number of times in the divorce case proceedings that Ms. Mack was a dangerous person and Mack expressed his fear that she would be physically violent against him. In addition, there was forensic evidence that Mack's blood

was found on the banister and bathroom mirror in his condo and on a paper list, in the rental Explorer he used that day, on his rear pants pocket and on the steering wheel in Ms. Mack's Lexus. This was evidence showing that Mack himself was injured in the deadly fight with Ms. Mack. There also was testimony that Mack was acting normally the day before and on the morning of the death of Ms. Mack and shooting of Weller. There was also evidence presented that on Ms. Mack's mirror in her residence were the words "so long, good riddance."

(4) The Evidence Presented Demonstrated That Mack Would Have Been Entitled To LIO Instructions Upon The LIOs Never Explained To Him By His Counsel Or The Court

All of this evidence amply met the Nevada LIO standard of some evidence (1) that the killing of Ms. Mack could have been without malice aforethought, premeditation, or deliberation, and could have been in the heat of passion, warranting LIO instructions on second degree murder and voluntary as well as involuntary manslaughter, and (2) that the shooting of Judge Weller was done without an intent to kill, warranting LIO instructions on the LIO for attempted murder outlined *supra*.

Because the trial did not reach the defense case-in-chief, other evidence about Ms. Mack's attack that day on Mack, and about her violent propensities had not yet been presented. However, the defense was going to

present evidence that Ms. Mack had solicited the murder of Mack's prior ex-wife and expert testimony through Dr. Hyman, a psychologist, about the violent nature and character of Ms. Mack and specific acts of violence upon which he based his testimony, as well as the reasonableness of Mack's response to her attack on him the day she was killed. Viewing this entire record, it is abundantly clear that Mack, at the end of the trial, would have been entitled to go to the jury on all the LIOs to first degree murder and attempted murder discussed *supra*.

2. Neither Defense Counsel Nor The Trial Court Ever Gave Mack Any Advisement On LIOs Prior To Entry Of The Mack Pleas Under The Plea Agreement

When Mack was offered and later accepted the plea deal, the affirmative undisputed evidence is that neither his counsel nor the court ever advised him (1) of the existence of and elements of LIOs to the murder and attempted murder charges, (2) the likelihood of Mack's conviction on only such LIOs as opposed to the greater charged offenses at the end of the trial, and (3) the substantially lesser penalties for such LIOs than for the greater penalties on the greater charged offenses accepted in the plea deal (hereinafter collectively "the LIO matters"). As shown *supra*, had Mack completed his trial, he would have been entitled to instructions on such LIOs. Furthermore, had Mack been properly advised on the LIO matters, he would not have accepted the plea deal but instead taken his trial to a jury verdict. While the prosecution was still presenting its case-in-chief, Mack's counsel came to him recommending that

he take a plea deal on both charges. This was the first time that Mack's counsel had discussed with Mack any plea deal since Mack, from the initial retention of Freeman and Chesnoff up until the trial (a period of over 16 months), had always insisted on taking his case to trial and counsel had assured him that they would do precisely that. The undisputed record shows that neither the court nor Mack's counsel ever advised Mack of any LIO matters pertaining to either the first degree murder or attempted murder charges at any time before the pleas were entered and accepted. Freeman testified that he never discussed the lesser offense of manslaughter with Mack prior to the plea agreement, stating, "I didn't have that conversation with him."[5]

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5. The full text of the testimony regarding this is as follows:

Q. Did you ever tell him before he entered a plea of first-degree murder that if in fact the jury finds that the defendant did not act in self-defense based on the *Byford* case they could very easily find that he was in the heat of passion if he was attacked, and the jury can come back with the lesser offense of manslaughter?

A. *I didn't have that conversation with him.* However, I probably would have had that conversation if we went to jury trial, we went to a verdict, because before I - typically what I do is, before I give jury instructions, I make a determination whether it's going to be first degree or nothing, or I'm going to ask the judge to give the different degrees in an open murder case. And if that occurred, it's typically my practice to discuss what you just said with the defendant, to see if they want a manslaughter instruction or a second-degree instruction.

Q. *I got you. But in this case you didn't approach that subject?*

(Cont'd)

Mack's testimony on the motion made clear he was not advised of any LIOs to the charges: "Nobody had ever explained anything about manslaughters, or what the laws were, or heat of passion mitigation. None of that was ever explained to me during the whole representation [of Chesnoff and Freeman]." Further, Mack was quite clear that he "wouldn't enter a guilty plea in this case knowingly and voluntarily at all" had he known of the possibility of LIOs. Mack was not advised of the elements or penalties of LIOs of second degree murder or of any manslaughter offenses. Mack was not aware of the heat of passion defense or how it could mitigate the murder charge to an LIO. Mack was not advised of the elements or penalty for the LIO to attempted murder. Mack was not advised as to the likelihood of conviction only upon such LIOs if he had

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(Cont'd)

A. *We didn't get there, so I didn't say it.*

. . . .

BY MR. ROUTSIS:

Q. Okay. Did you feel you had an obligation to go over that with him so the man understood, that Darren Mack understood that — I mean, that in this case, if he was fighting for his life, and the jury found it wasn't self-defense, they could find it's manslaughter. Did you — did that ever —

A. At the plea?

Q Did that ever — did you ever think about that?

A. *Like I said, if it had gone to verdict, but at plea, I did not.*

(emphasis added).

finished his trial and not taken the plea deal. At no time was Mack, a person with no legal training or background and having never been previously arrested or charged with a crime, given any such LIO matters advice either prior to or at the plea proceedings.

3. The Trial Court Ruling

In his motion to withdraw his pleas, Mack raised this failure to advise on LIO matters prior to his pleas as making his pleas not knowingly, voluntarily, and intelligently entered with a full understanding of the nature and consequences of entering his pleas. Mack initially raised this issue in the context of the trial court's failure to canvass on LIOs, but then elicited from trial counsel, in the evidentiary hearing on the motion, that trial counsel never advised Mack about any LIO matters when advising Mack to accept the plea deal. As discussed *infra*, the relevant case law places primary responsibility on trial counsel to discuss with the client all possible LIO matters to make sure the client makes a knowing, voluntarily and informed choice on pleading guilty to a greater offense, with a full understanding of the nature and consequences of the plea, and generally relies upon counsel's representation that counsel has done so. Here the court knew, by the end of the evidentiary hearing on the motion to withdraw, that trial counsel had never informed Mack of any LIO matters before he entered his pleas. Inexplicably, the court still denied the motion despite having this undisputed evidence before it. In doing so, the court accepted as true the undisputed fact that Mack's counsel had not advised him on any of the LIO matters on either the first degree murder or attempted murder pleas and found that the time to

discuss LIO matters with Mack had not yet arisen since the trial had not reached the point where jury instructions would be submitted and settled.[6] Thus, the trial court clearly decided the constitutional LIO issues presented here as they pertained to the pleas being knowingly, voluntarily, and intelligently entered, with a full understanding of the nature and consequences of the pleas, and found no denial of federal due process and further found that trial counsel was not ineffective for failing to advise Mack of any LIO matters before he entered his pleas.

4. The Nevada Supreme Court Decision

The Nevada Supreme Court held, on appeal of the LIOs issue, that defense counsel had no duty to advise Mack regarding LIO matters and that the pleas were knowingly, voluntarily, and intelligently made.

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6. The full text of the court's findings on this point is as follows:

I think that Mr. Routsis acknowledged that they had a good argument as to self-defense, that's what he would have pursued, but he also thought that maybe, you know, that manslaughter was something that should have been discussed with Mr. Mack in the context of a plea. They weren't pursuing that as a defense.

Now that doesn't mean that something wouldn't come up at the time that you're going to the jury and doing jury instructions and so forth, but ,really, they're asking for acquittal, they're asking for not guilty, they're saying this is self-defense, not that I did it with some intent but it wasn't murder, they're saying self-defense. So whether you argue it as manslaughter, we haven't gotten to that point yet.

App., *infra* 15a (emphasis added).

The court noted that Mack had in his motion contended that the failure of defense counsel or the court to provide any advisement on LIO matters made his pleas ones that were not knowingly, voluntarily, and intelligently made. App., *infra* 1a-2a. The court found that the failure of defense counsel to so advise Mack was neither deficient (not falling below an objective standard of reasonableness)[7] nor prejudicial under *Strickland v. Washington*, 466 U.S. 668, 686 (1984) in that Mack had not shown he would have insisted on going to trial if he had been advised fully on LIOs. App., *infra* 3a-4a. As to the latter point, the record is undisputed, as discussed *supra*, that Mack would not have taken the plea deal if properly advised about LIO matters. In addition, Mack *was already in trial when the plea deal was offered and the record showed, even from defense counsel's testimony at the motion hearing, that Mack had always expressed a consistent desire to have a jury trial.* Thus, the court's statement that Mack would not have insisted on *going* to trial is manifestly erroneous.

As to the initial point – deficient performance – the court's statement is belied by uniform case law in federal and state courts, discussed *infra*, that counsel's failure to advise on LIO matters before a defendant pleads to a greater charge is a denial of due process and the right to effective assistance of counsel because such a plea in not knowingly, voluntarily, and intelligently made with

7. The court also stated that there was no requirement that the court make sure a defendant was advised of applicable LIOs (App., *infra* 3a-9a), thus declining without further discussion to follow the Montana court process of ensuring that a defendant is advised of applicable LIOs, as discussed *infra*.

a full understanding of the nature and consequences of the plea.[8]

The court stated that Mack asked his counsel about manslaughter and thus was aware of "other possible defenses " and had some unspecified discussion about second degree murder. App., *infra* 5a-7a. That statement again misses the point entirely – as discussed *supra*, defense counsel *admitted* in the motion hearing that they had not advised Mack on any LIO matters before he entered his pleas and the trial court accepted that as fact. What Mack specifically was advised, and by whom, and in what context, is not addressed by the court's decision, but this record shows indisputably that Mack was never advised on any LIO matters by his counsel or the court before he entered his pleas. Thus, some unspecified general "awareness" of other "possible defenses" does not equate with being advised on the specific elements and penalties of the specific LIOs that plainly applied here or the likelihood of conviction at trial only on such LIOs. Thus, the court's attempt to find some vague advisement is not only a *non sequitur*,

8. The court's noting that Mack had read and signed a plea agreement, that his counsel had answered any questions he had, and that Mack understood the trial rights he waived by making the pleas, the *direct* consequences of entering his pleas (elements of the offense and penalties), and the nature of the charges to which he entered his pleas, App., *infra* 6a-7a, is plainly not relevant to, and does not address in any fashion the question raised - whether Mack understood the nature and consequences of his pleas by his giving up viable defenses that would have been evident if he had properly been advised on LIO matters that likely would have resulted in conviction only upon an LIO and not the charges to which he pled.

but a creation made whole cloth that is directly contrary to the undisputed factual record.

The court also sought to distinguish the relevant case law that it stated did not provide adequate support that reversal of a plea is required "simply" because a defendant was not informed of applicable LIOs. App., *infra* 7a-9a. As discussed immediately *infra*, those cases stand directly for the propositions that such failure to advise on LIO matters is legal error, denying a defendant his federal rights to due process and to the effective assistance of counsel.

Contrary to the court's statement, the cases cited by Mack in his opening and reply briefs clearly stand for and fully support the proposition that defense counsel's failure to advise the defendant on LIO matters when advising on whether to accept a plea deal to greater offenses, if proved, results in a denial of due process of law and in ineffective assistance of counsel. Some of the cases cited by Mack directly found either a denial of due process or the right to effective assistance of counsel for defense counsel's failure to advise the defendant on LIO matters. *Copas v. Commsnr. Of Correction*, 234 Conn. 139, 662 A.2d 718 (Conn. 1995) (defense counsel's failure to advise defendant of defenses and LIOs, where defendant pleaded guilty to first degree murder, was ineffective assistance of counsel requiring vacating of plea); *Harlow v. Murray*, 443 F.Supp. 1327 (W.D. Va. 1978) (level of defendant understanding is measured by an examination as to whether the plea represents a voluntary and intelligent choice among the alternate choices of action open to the defendant; defendant's plea was involuntary – and not made

intelligently and with awareness of consequences of plea when he unwittingly admitted, based on mistaken advice of counsel, to premeditation element of first degree murder thinking that intoxication evidence would reduce it to second degree murder; habeas petition granted); *Rinehart v. Brewer*, 561 F.2d 126, 130-32 (8th Cir. 1977) (defense counsel's failure to advise on LIOs and to assess likelihood of conviction at trial only upon LOIs makes plea involuntary as matter of law and denial of federal rights to due process and effective assistance of counsel); *State v. Azure*, 175 Mont. 189, 573 P.2d 179 (Mont. 1977) (court must canvass on LIOs in homicide case where plea to greater charge to make sure plea is knowingly and voluntarily made with a full understanding of the charge and consequences of the plea; failure of court to canvass on LIOs was denial of due process making plea involuntary; denial of motion to withdraw plea reversed)[9]; *State v. Felton*, 110 Wisc. 485, 505-13, 329 N.W.2d 161 (Wisc. 1983) (in first degree murder trial, where defendant convicted of second degree murder, failure of defense counsel to be aware of and present defense on LIO of heat of passion manslaughter was denial of right to effective assistance of counsel); *Jones v. Montana*, 235 F.Supp. 673 (D.Mont. 1964) (court found a denial of due process in the acceptance of a guilty plea to a charge of first degree burglary where it was shown

9. Montana courts place the requirement of canvassing on LIO matters on the trial court to avoid any such plea problems. *Azure, supra*; *Jones v. Montana*, 235 F.Supp. 673 (D.Mont. 1964) (court advisement on LIO matters required in taking plea to greater offense). This case presents an example of where a court's failure to conduct a full and complete canvass creates the problem that a plea is not entered knowingly, voluntarily, and with a full understanding of the consequences of the plea.

the accused had not been informed as to the difference between first and second degree burglary prior to entry of his plea).

Other cases cited by Mack are habeas cases where the appellate court held that a defendant's allegation of a failure to advise on LIOs required an evidentiary hearing because, if proved, such a failure would be either a denial of due process or be ineffective assistance of counsel. *Connolly v. State*, 2007 WL 1228014 (Ala.Crim.App. 2007) (defendant allegations that he was not advised by counsel of murder elements (the charged greater offense) or of LIOs (such as negligent homicide) before he took plea deal to manslaughter charge, making plea involuntary and denying right to effective assistance of counsel, entitled defendant to evidentiary hearing on allegations in post-conviction petition); *People v. Thew*, 201 Mich. App. 78, 91-95, 506 N.W.2d 547 (Mich. 1993) (defendant entitled to evidentiary hearing on motion to withdraw felony-murder guilty plea based upon ineffective assistance of counsel claim where alleged that defense counsel failed to advise defendant of defenses and LIOs; defense counsel has a "particularly stringent duty" to make sure defendant understood the nature of the charges and the consequences of his guilty plea); *see also Duprey v. State*, 870 So.2d 256 (Fla. App. 2004) (remand for evidentiary hearing on whether counsel failed to advise on LIO matters); *Thompson v. State*, 818 So.2d 632 (Fla.App. 2002) (vacating denial of motion to withdraw plea and remanding for evidentiary hearing on counsel failure to advise on LIO matters); *Phillips v. State*, 2001 WL 717358 (Tenn. Crim. App. 2001) (remand for evidentiary hearing on whether counsel failed to advise on LIO matters).

All these cases fully support the proposition that failure of defense counsel to advise a defendant on LIOs matters when a plea is made to a greater charge is either a denial of due process or ineffective assistance of counsel. These cases plainly demonstrate that defense counsels' failure to advise Mack on LIO matters fell below an objective standard of reasonableness and was constitutionally ineffective. The cases completely support the principle that defense counsel's failure to advise on LOI matters requires reversal of a conviction pursuant to a guilty plea because that failure is a denial of due process and the right to effective assistance of counsel. The Nevada Supreme Court's holdings to the contrary misapprehend the plain holdings on these points in the cases relied upon by Mack.

Finally, the court states that Mack only contended he was not advised about LIO matters, and never contended he had any "real possibility" of being convicted only of such LIOs. App., *infra* 9a. That is not a correct factual statement. Mack's briefs plainly and expressly argued that his case was a classic case for an LIO to first degree murder (be it second degree murder, or voluntary or involuntary manslaughter), and cited to the Nevada case of *Williams v. State*, 99 Nev. 530, 665 P.2d 260 (1983) as an example of a case of analogous facts where the Nevada Supreme Court reversed for failure to give such LIO instructions. Mack Opening Brief at 11-14; Mack Reply Brief at 4, 6-7, 12-18.[10] Mack also addressed that issue in oral argument before the Nevada

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10. In this regard, the factual circumstances here closely resemble those found in *Williams*, involving a second degree murder conviction. In *Williams*, the court found the defendant's (Cont'd)

Supreme Court, noting how this was a classic case for manslaughter, if not a defense acquittal, due to the fact that the decedent, Mack's estranged spouse, had a history of violence towards Mack, that the death occurred during a violent argument, and that a jury could easily find the death occurred in the heat of passion, without premeditation or an intent to kill.

Similarly, on the attempted murder charge the dispute was over whether Mack had the intent to kill or not (the focus of the not guilty by reason of insanity plea

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(Cont'd)
testimony (through admission of his post-arrest statement) that the decedent was the initial aggressor in attacking the defendant (by throwing the defendant to the floor) and the defendant responding by striking a fatal blow (with a shoe to the decedent's head) required giving LIO instructions on voluntary manslaughter. *Williams*, 99 Nev. at 530-31, 665 P.2d at 261-62. The court held that the defendant's statement alone, if believed by the jury, could have warranted only a conviction for the LIO of heat of passion voluntary manslaughter based upon the provocation by decedent, and that it was reversible error for the trial court to refuse an LIO instruction on voluntary manslaughter. *Id.* Since the court found some evidence, no matter how weak or incredible, to support the voluntary manslaughter LIO, the failure to instruct on that LIO improperly removed it from jury consideration and required reversal of the second degree murder conviction. *Id. Williams* has recently been cited with approval in the Nevada court's latest pronouncement on LIO rules. *Rosas*, 122 Nev. 1258, 147 P.3d at 1104 & n. 2, 1106 & n. 8, 1107 & n. 17, 1108-09 & n. 31. Thus, *Williams* stands for the proposition that a defendant's testimony *alone* that the decedent was the aggressor provoking the attack is some evidence that requires the giving of LIO instructions to the greater murder charge filed by the prosecution here.

to the attempted murder charge), not whether he shot Judge Weller, where Mack's mental state bore directly on that intent to kill issue. Without such an intent to kill, Mack would only be guilty of the LIO of assault with a deadly weapon causing serious bodily injury.

Thus, Mack argued there was a real possibility of conviction only upon the LIOs to each offense. The Supreme Court's contrary statement is factually clearly erroneous, unwarranted and unsupportable.

REASONS FOR GRANTING THE PETITION

A. The Nevada Supreme Court Decision Conflicts With Decisions Of This Court

To pass federal constitutional muster, Mack's pleas, pursuant to the plea agreement, must be shown, under the totality of the circumstances, to have been knowingly, voluntarily, and intelligently entered, with a full understanding of the nature of the offenses and the consequences of the pleas. *Parke v. Raley*, 506 U.S. 20, 28-29 (1992) (describing the standard as both "knowing and voluntary" and "voluntary and intelligent"); *Brady v. United States*, 397 U.S. 742, 748 (1970) (waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences); *Boykin v. Alabama*, 395 U.S. 238, 242, 244 (1969) (plea must be "intelligent and voluntary"; defendant pleading guilty must have "a full understanding of what the plea connotes and of its consequence"); *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (plea must be "voluntary and knowing"). To

be a knowing, voluntary, and intelligent plea the plea must represent "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Parke, supra*, 506 U.S. at 29. Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *Padilla v. Kentucky*, 130 S.Ct.1473, 1480-81 (2010), *citing McMann* v. *Richardson*, 397 U.S. 759, 771 (1970) and *Strickland v. Washington*, 466 U.S., 668, 686 (1984). Ineffective assistance of counsel can involve not only defense counsel's affirmative misadvice on the law but also a failure to advise on the law. *Padilla*, 130 S.Ct. at 1484. This Court has long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Id.* at 1486. The purpose of the knowing and voluntary inquiry is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced. *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993).

The Nevada Supreme Court's decision is inconsistent with these black-letter standards. How is a defendant to make a knowing and voluntary decision to plead guilty to a greater offense without knowing of the existence of applicable LIOs, the elements and penalties for such LIOs, and the likelihood of conviction only upon such LIOs? How is such a solemn decision to be made without knowing of such LIOs and how they might apply to the defendant's case – to be made with a full understanding of the nature of the offenses and the consequences of the pleas – to be "knowing, intelligent acts done with sufficient awareness of the relevant

circumstances and likely consequences" of entering the plea? Without such knowledge about the LIOs a defendant cannot make "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Parke, supra*, 506 U.S. at 29. If a defendant has not been given appropriate LIO advisements about such LIOs, their elements and penalties, and the likelihood of conviction only upon LIOs at trial, a defendant simply cannot make a knowing and intelligent choice as to his options. Such a defendant, without proper LIO matter advisement, does not even know of those options, let alone how they might apply to his case in assessing the relative risks of pleading guilty to the greater charges as opposed to the chances of conviction at trial only upon LIOs with lesser penalties.

B. The Nevada Supreme Court Decision Is Directly In Conflict With Case Law Authority Requiring The Giving Of Such LIO Advisement

As discussed *supra*, all the reported decisions in the country on the LIO matter issue have found that the failure of defense counsel and the trial court to advise on LIO matters when pleading to a greater offense rendered the pleas involuntary and are a denial of the rights to due process and to the effective assistance of counsel. Nevada, in rejecting those holdings in this case, where it is clear neither defense counsel nor the district court gave Mack an advice on any LIO matters, stands alone.

This is an important recurring issue in the criminal law because of the thousands of cases in which plea

agreements are entered to greater offenses that encompass LIOs. Normally, such LIO advice is included in the plea discussions that defense counsel has with the defendant. However, on some occasions like here, neither defense counsel nor the trial court have advised a defendant on LIO matters before the defendant pleaded guilty to greater offenses. On such occasions, the courts across this country have found defense counsel's failure to provide such LIO matter advice makes the plea one that is not knowingly, voluntarily, and intelligently entered, with a full understanding of the nature of the offenses and the consequences of the pleas.

The failure of Mack's trial counsel, and the court, to advise him on any LIOs to first degree murder and attempted murder was a denial of his federal constitutional rights to due process and to the effective assistance of counsel. Mack's pleas were not knowingly, intelligently, and voluntarily made with a full understanding of the nature and consequences of the pleas.

In the context of pleas, an ineffective assistance claim requires a defendant to show (1) that counsel's performance was not within the range of competence demanded for counsel in criminal cases and (2) that deficiency prejudiced the defendant in that there is a reasonable probability that but for counsel's errors, he would not have taken the plea deal and would have insisted in going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985). Mack's counsel's failure to properly advise Mack of all his defenses, of LIOs and their elements and penalties, and the likelihood of conviction on only LIOs

and not the greater charges was deficient as not within the range of competence demanded for criminal attorneys. The error also was prejudicial in that Mack would not have entered the pleas, and would have insisted on continuing with his trial, but for counsel's errors.

Of great importance is that the penalties for the LIOs to murder are substantially less than the penalty for first degree murder – the LIOs and their possible punishments are (1) second degree murder (by life or a term of 25 years, both with parole eligibility at 10 years) [N.R.S. §200.30]; voluntary manslaughter (by not less than 1 year with maximum of 10 years, with a fine of not more than $10,000) [N.R.S. §200.80]; and involuntary manslaughter (by not less than 1 year with maximum of 4 years, with a fine of not more than $5,000) [N.R.S. §200.90]. Under the plea deal Mack was given a life sentence with a 20-year parole eligibility. To make a knowledgeable decision on the plea deal, Mack needed a full understanding of the elements of all LIOs to first degree murder, the likelihood of conviction only on an LIO, and the significantly lesser penalties of such LIOs.

Similarly, the penalty for the LIO to attempted murder is substantially less than the penalty for attempted murder –battery with a deadly weapon (with substantial bodily harm) is punishable by a sentence of not less than 2 years or more than 15 years, with a fine of not more than $10,000) [N.R.S. §200.481(e)(2)] and battery with a deadly weapon (without substantial bodily harm, is punishable by a sentence of not less than 2 years or more than 10 years, with a fine of not more than $10,000) [N.R.S. §200.481(e)(1)]. The penalty for

attempted murder is not less than 2 years and not more than 20 years [N.R.S. §193.330(1)(a)(1)], with use of a deadly weapon providing an enhancement of an additional imprisonment of not less than 1 year and not more than 20 years [N.R.S. §193.165(1)]. Since, under the plea deal, Mack was pleading open to the maximum possible sentence for attempted murder with use of a deadly weapon with a sentence that could be imposed consecutively, Mack likewise needed to make a knowledgeable decision on the plea deal, and have a full understanding of the consequences of taking the plea deal. He needed to be fully advised of all LIO matters regarding the attempted murder charge, including possible penalties and likelihood of conviction only on the LIO.

The obligation of counsel to advise Mack of the LIO matters was triggered when counsel began to have general discussions with Mack about plea options and a plea deal and specifically when the plea deal was offered. The obligation of the court to so advise Mack was triggered when accepting Mack's pleas in order to ensure that he was making a voluntary, intelligent, knowing, and informed decision on whether to take the offered plea deal, and that he was fully apprised of the consequences of either taking or rejecting the plea deal. Such obligations must be addressed at these points, even if they might not otherwise be addressed until the stage of preparing and settling jury instructions. Counsel's failure to give such advice on LIO matters, or for the court to canvass upon them, is inexcusable particularly given the facts and gravity of this case - an estranged couple, Ms. Mack's history of violence and abuse against Mack, and Mack's delusional mental

disorder and beliefs - facts which clearly could have supported only LIO convictions regarding either the death of Ms. Mack or the shooting of Judge Weller.

CONCLUSION

Failure to give advice on such LIO matters here was (1) a denial of federal right to due process since it made Mack's pleas involuntary and (2) a denial of his federal right to the effective assistance of counsel.

The petition for a writ of certiorari should be granted on this important LIO advisement issue as it pertains to the taking of guilty or *Alford* pleas.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF AFFIRMANCE OF THE SUPREME COURT OF THE STATE OF NEVADA FILED JUNE 22, 2010

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 51143

DARREN ROY MACK,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, to first-degree murder, and, pursuant to an *Alford* plea, to attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On appeal, appellant Darren Mack raises two issues. He first contends that the district court abused its discretion when it denied his presentence motion to withdraw his guilty pleas after holding a hearing on the matter. In this regard, Mack argues that his pleas were

not knowingly, voluntarily, and intelligently entered with a full understanding of the nature and consequences of the pleas because neither the court nor his counsel informed him of all of the elements of the lesser-included offenses or the lesser penalties for those offenses. Second, Mack contends that the district court improperly involved itself in his plea negotiations, thereby violating the bright-line rule established in *Cripps v. State*, 122 Nev. 764, 137 P.3d 1187 (2006). We conclude that both of these contentions lack merit.

MOTION TO WITHDRAW THE GUILTY PLEA

"A district court may, in its discretion, grant a defendant's [presentence] motion to withdraw a guilty plea for any 'substantial reason' if it is 'fair and just.'" *Woods v. State*, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998) (quoting *State v. District Court*, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969)); *see also* NRS 176.165. In deciding whether a defendant has "advanced a substantial, fair, and just reason to withdraw a plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently." *See Crawford v. State*, 117 Nev. 718, 722, 30 P.3d 1123, 1125-26 (2001). A district court "has a duty to review the entire record to determine whether the plea was valid. A district court may not simply review the plea canvass in a vacuum." *Mitchell v. State*, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993). A defendant has no right, however, to withdraw his plea merely because he moves to do so prior to sentencing or because the State failed to establish actual

prejudice. *See Hubbard v. State*, 110 Nev. 671, 675-76, 877 P.2d 519, 521 (1994). Further, "this court has never required the 'articulation of talismanic phrases' at plea hearings, and we have instead been flexible in terms of permitting a district judge wide latitude in fulfilling the above requirements." *Bryant v. State*, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986) (internal citation omitted), *superseded by statute on other grounds in Hart v. State*, 116 Nev. 558, 562, 1 P.3d 969, 971 (2000). Nevertheless, a more lenient standard applies to motions filed prior to sentencing than to motions filed after sentencing. *See Molina v. State*, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004).

During the evidentiary hearing on his presentence motion to withdraw his guilty pleas, Mack sought to withdraw the pleas on the basis that his counsel and the court failed to advise him of the elements of all the lesser-included offenses to first-degree murder or attempted murder, the likelihood of his conviction on the lesser-included offenses (rather than the greater charged offenses), or the lesser penalties for the lesser-included offenses. In the context of his assertion that his pleas were not knowing and voluntary, Mack claims that his counsel was ineffective as to his guilty pleas. Thus, we must review caselaw related to the assistance of counsel, *i.e.*, as it relates to the validity of his plea.

A petitioner must satisfy a two-part test, originally set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to establish that counsel's assistance was ineffective. *Molina v. State*, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004). "Under *Strickland*, the defendant must

demonstrate that his counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness, and that the deficient performance prejudiced the defense." *Id.* "To establish prejudice in the context of a challenge to a guilty plea based upon an assertion of ineffective assistance of counsel, a defendant must "'demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"" *Molina*, 120 Nev. at 190-91, 87 P.3d at 537 (quoting *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985))). While "[w]e need not consider both prongs of the test if the defendant makes an insufficient showing on either one," *Molina*, 120 Nev. at 190, 87 P.3d at 537, we note that Mack failed to meet his burden on either prong of his ineffective assistance claim because his attorneys' performances did not fall below an objective standard of reasonableness and he failed to demonstrate a reasonable probability that but for counsel's failure to advise him on the lesser-included offenses he would not have pleaded guilty and insisted on going to trial.

Further, Mack failed to meet his burden of demonstrating that his guilty plea agreement or plea canvass were invalid. In Nevada, as outlined in *Heffley v. Warden*, "the court's 'canvassing' should accomplish at least two tasks: (1) assure that the defendant does not improvidently or involuntarily waive his constitutional right to jury trial, right to confront witnesses, and privilege against self-incrimination; and, (2) facilitate and deter appellate and collateral

proceedings on the plea." 89 Nev. 573, 574, 516 P.2d 1403, 1404 (1973) (citing *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969)).

In comparison, Mack argued for relief pursuant to Rule 11 of the Federal Rules of Criminal Procedure, which sets forth specific procedures designed to assist the judge in making the determination of whether a defendant's guilty plea is truly voluntary and knowing. *McCarthy v. United States*, 394 U.S. 459, 465 (1969).[1] In particular, Rule 11(b)(2) requires a federal district judge to "address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)."[2]

While Nevada does not have the same detailed procedure followed by federal courts, as provided in

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1. Rule 11 "requires a judge to address a defendant about to enter a plea of guilty, to ensure that he understands the law of his crime in relation to the facts of his case, as well as his rights as a criminal defendant." *United States v. Vonn*, 535 U.S. 55, 62 (2002).

2. In determining whether the entry of a plea of guilty by a criminal defendant was valid in federal court, the following questions must be answered:

> 1. Was the defendant advised of the constitutional rights that are waived by a plea of guilty?
>
> 2. Was the defendant advised of the direct consequences of the plea?
>
> 3. Was the defendant adequately advised of the nature of the charges to which he or she pleaded guilty?

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Rule 11, it does incorporate the general scheme of the rule in determining whether a guilty plea was entered knowingly, voluntarily, and intelligently. Based on this scheme, we conclude that the district court did not abuse its discretion when it denied Mack's presentence motion to withdraw his guilty plea. In this case, the district court judge asked Mack if he had "occasion to read the plea agreement before [he] signed it?" and "[d]id [his] attorneys answer any questions [he] had before [he] signed it?" Mack answered yes to both of these questions. In addition, Mack was asked if he had been advised of his constitutional rights that were waived by pleading guilty, the direct consequences of the plea, and the nature of the charges to which he pleaded guilty, and he answered in the affirmative to each of these questions.

Further, during Mack's plea canvass, the judge asked him questions to determine whether his plea was entered knowingly, intelligently, and voluntarily. Throughout this exchange, Mack asked the judge questions and affirmatively stated that he understood the consequences of his plea. Mack testified that he

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> 4. Did the court make a sufficient inquiry as to a factual basis for the plea of guilty?
>
> 5. Was the guilty plea voluntarily entered?
>
> 6. If the court failed to adequately advise the defendant of the consequences of the plea, was the error harmless?

42 Am. Jur. Trials, at 534-35 (1991).

asked his attorneys about manslaughter since he was charged with open murder, thereby acknowledging he was aware of other possible offenses.

In addition, the court made a sufficient inquiry as to a factual basis for the plea, as evidenced by the plea canvass, and found that the plea was voluntarily entered. Therefore, although Nevada law does not require courts to strictly adhere to detailed requirements such as those set forth in Rule 11, Nevada law parallels the purpose of Rule 11 in requiring that a canvass of a defendant's guilty plea sufficiently explore whether the plea is voluntary, knowing, and intelligent. Based upon the totality of the circumstances, a sufficiently thorough canvass was conducted in this case. We conclude that Mack's assertion of his pleas being invalid and not being knowingly, voluntarily, and intelligently entered are belied by the record.

Moreover, to the extent Mack claims his attorneys acted improperly because they did not provide him with information regarding lesser-included offenses because they planned to argue self-defense, we disagree. There is no caselaw in Nevada that supports Mack's assertion that a defendant must be advised of lesser-included offenses in order for a plea of guilty to be entered knowingly, voluntarily, and intelligently. Mack cites to several cases in his opening brief that support an appellate court overturning a defendant's plea of guilty

based on findings that the defendant did not knowingly, voluntarily, and intelligently enter into the plea.[3] However, the cases do not provide adequate support for the principle that reversal of a conviction pursuant to a guilty plea is warranted simply on grounds that a defendant was not informed of lesser-included offenses.

Further, to the extent Mack argues that this case is analogous to *Rinehart v. Brewer*, 561 F.2d 126 (8th Cir. 1977), we disagree. In *Rinehart*, the Eighth Circuit Court of Appeals held that a fifteen-year-old defendant's guilty plea to a murder charge, when viewed in the totality of the circumstances, was not entered voluntarily and understandingly because he was not informed of the elements of the crime of manslaughter and there was a probability that he would have been found guilty of manslaughter based on the facts of the case. *Id.* at 130-32.

To begin with, we note that in *Rinehart*, the judge failed to even inquire whether the defendant understood the charge or consequences of his guilty plea. *Id.* at 131. In contrast, here, Mack testified that he asked his attorneys about manslaughter since he was charged with open murder, thereby acknowledging he was aware of other possible offenses. Mack claims his attorneys did

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3. Including *Copas v. Commissioner of Correction*, 662 A.2d 718 (Conn. 1995); *Thompson v. State*, 818 So. 2d 632 (Fla. Dist. App. 2002); *Duprey v. State*, 870 So. 2d 256 (Fla. Dist. App. 2004); *People v. Thew*, 506 N.W.2d 547 (Mich. 1993); *Harlow v. Murray*, 443 F. Supp. 1327 (W.D. Va. 1978); and *State v. Felton*, 329 N.W.2d 161 (Wis. 1983).

not provide information regarding lesser-included offenses because they planned to argue self-defense. However, one of Mack's trial attorneys testified at the hearing on Mack's motion to withdraw the guilty pleas that Mack had expressed an interest in pleading to "[s]omething less than first degree" and that second-degree murder was discussed. Mack also argued that he was entitled to information on the lesser-included offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter as to the first count, and assault with a deadly weapon, battery with use of a deadly weapon, and assault or battery with intent to kill as to the second count. Mack does not assert that based on the facts of his case he had a real possibility of being convicted of any of these lesser-included offenses. Instead, Mack simply asserts that he was entitled to information on these lesser-included offenses, not that there was a probability that he would have been found guilty of any of them rather than the counts to which he pleaded guilty. This is an important distinction from the *Rinehart* decision that militates against its application in this case. Thus, we conclude the district court did not abuse its discretion in denying Mack's presentence motion to withdraw his guilty pleas.[4]

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4. We are not persuaded that the judge should canvass counsel, as well as the defendant, when accepting a guilty plea, as Mack suggested in oral argument. Therefore, we do not extend the canvass rule to counsel.

Appendix A

ALLEGED CRIPPS VIOLATION

Next, Mack argues that the district court's involvement in the plea negotiations violated the bright-line rule established in *Cripps v. State* because the district court inserted itself into his plea negotiations. 122 Nev. 764, 137 P.3d 1187 (2006). In *Cripps*, this court adopted a "bright-line rule" that "prohibit[s] any judicial participation in the formulation or discussions of a potential plea agreement with" the "limited exception" that "the judge may indicate on the record whether the judge is inclined to follow a particular sentencing recommendation of the parties." 122 Nev. at 770-71, 137 P.3d at 1191. This court reviews a judge's violation of the *Cripps* bright-line rule for harmless error. 122 Nev. at 771, 137 P.3d at 1192. We find no error as to the alleged *Cripps* violation.

The district court's involvement in plea negotiations was extremely limited in this case. The court allowed Mack to see his family prior to agreeing to the plea deal and allowed Mack an opportunity to speak during sentencing pursuant to the conditional plea. The only discretion that the district court had at sentencing was whether to impose consecutive or concurrent terms. The judge's involvement in facilitating plea negotiations is devoid of any promises that may reasonably be viewed as having been a material factor in affecting Mack's decision to plead guilty. Therefore, we conclude there was no *Cripps* violation. Accordingly, we

Appendix A

ORDER the judgment of the district court AFFIRMED.[5]

/s/ _____, C.J.
Parraguirre

/s/ _____, J.
Douglas

/s/ _____, J.
Cherry

/s/ _____, J.
Saitta

/s/ _____, J.
Gibbons

/s/ _____, J.
Pickering

5. The Honorable James W. Hardesty, Justice, voluntarily recused himself from participation in the decision of this matter.

APPENDIX B — ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEAS IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE FILED FEBRUARY 1, 2008

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF WASHOE

CASE NO. C237716/CR06-1386
DEPT NO. III/OJ-19

ORDR
CHRISTOPHER J. LALLI
Washoe County Special Prosecutor
Nevada Bar #005398
Office of the Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorneys for Plaintiff

THE STATE OF NEVADA,

Plaintiff,

-vs-

DARREN ROY MACK,

Defendant.

Appendix B

ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEAS

DATE OF HEARING: 1/18/2008

TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 18th day of January, 2008, the Defendant being present, represented by WILLIAM ROUTSIS, ESQ., the Plaintiff being represented CHRISTOPHER J. LALLI, Washoe County Special Prosecutor, and the Court having heard the arguments of counsel and good cause appearing therefor,

IT IS HEREBY ORDERED that the Defendant's Motion to Withdraw Guilty Pleas, shall be, and it is Denied.

DATED this 31 day of January, 2008.

/s/
District Judge

BY /s/
CHRISTOPHER J. LALLI
Washoe County Special Prosecutor
Nevada Bar #005398

APPENDIX C — EXCERPT OF TRANSCRIPT OF PROCEEDINGS RE: MOTION TO WITHDRAW PLEA IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, BEING HEARD IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK
DATED JANUARY 18, 2008
FILED JANUARY 30, 2008

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, BEING HEARD IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

Case Nos. CR06-1386/07-C-237716-C

THE STATE OF NEVADA,

Plaintiff,

vs.

DARREN ROY MACK,

Defendant.

EXCERPT OF TRANSCRIPT OF PROCEEDINGS RE: MOTION TO WITHDRAW PLEA

* * *

Appendix C

At page 132:

THE COURT: You know, the, the trial strategies, you know, this wasn't as big a point that was being made, other than discussion of the opening statements, but there seemed to be not any great disagreement with self-defense being sought as a defense strategy for Count 1, obviously. I think Mr. Routsis acknowledged that they had a good argument as to self-defense, that's what he would have pursued, but he also thought that maybe, you know, that manslaughter was something that should have been discussed with Mr. Mack in the context of a plea. They weren't pursuing that as a defense.

Now that doesn't mean that something wouldn't come up at the time that you're going to the jury and doing jury instructions and so forth, but, really, they're, they're asking for acquittal, they're asking for not guilty, they're saying this is self-defense, not that I did it with some intent but it wasn't murder, they're saying self-defense. So whether you argue it as manslaughter, we haven't gotten to that point yet.

* * *

At pages 154-55:

THE COURT: But in following the rules, as set forth, in my mind, by the Nevada Revised Statutes, and the rules set forth in the case authority of the Nevada Supreme Court, and the rules set forth in the case authority of the United States Supreme Court, it's my

decision that the totality of circumstances overwhelmingly proves that Mr. Mack's pleas involve, in line with Hanley, an understanding waiver of constitutional rights and privileges and an absence of coercion by threat or promise of leniency, and understanding of the consequences of his plea, and an understanding of the charge of the elements of the offense.

I also find that he received effective assistance of counsel under Strickland in relation to prior counsel's representation such that it did not affect the voluntariness of his plea as under the standards set forth in Molina from the Nevada Supreme Court, and therefore the motion to withdraw the plea is going to be denied.

* * * *

APPENDIX D — ORDER DENYING REHEARING IN THE SUPREME COURT OF THE STATE OF NEVADA, FILED SEPTEMBER 3, 2010

SUPREME COURT OF THE STATE OF NEVADA

No. 51143

DARREN ROY MACK,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

ORDER DENYING REHEARING

Rehearing denied, NRAP 40(c).

It is so ORDERED.

/s/ _____, C.J.
Parraguirre

/s/ _____, J.
Douglas

/s/ _____, J.
Cherry

/s/ _____, J.
Saitta

/s/ _____, J.
Gibbons

/s/ _____, J.
Pickering

Appendix D

cc: Hon. Douglas W. Herndon, District Judge
The Eighth District Court Clerk
Attorney General/Carson City
Clark County District Attorney
Kasowitz, Benson, Torres & Friedman, LLP
Routsis Gilbert & Swafford